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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

NO. 463

ALBERT ORNATO
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND APPENDIX

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Albert Ornato, Petitioner, prays that a Writ of Certiorari issue to the Supreme Court of Pennsylvania, to review the final judgment of the Supreme Court of Pennsylvania, entered on July 8th, 1960, in the case of Commonwealth of Pennsylvania v. Albert Ornato, affirming the judgment of the Superior Court of Pennsylvania of March 24, 1960.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Quarter Sessions of the Peace of Allegheny County, Pennsylvania, is not reported, and is printed in the Appendix hereto, p. 16.

The opinion of the Superior Court of Pennsylvania, reported at 191 Pa. Superior Ct. 581, 519 A. 2d 223, is printed in the Appendix hereto at p. 22. The Per Curiam opinion of the Supreme Court of Pennsylvania is reported at 400 Pa. 626, 163 A. 2d 91, and appears in the Appendix hereto at p. 29.

JURISDICTION

The judgment and order of the Supreme Court of Pennsylvania was entered July 8, 1960. The order affirmed the order of the Superior Court of Pennsylvania, entered March 24, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Where, upon trial of several indictments, defendant is convicted of "corrupt solicitation for the purpose of protecting and maintaining a lottery", but is acquitted of maintaining such lottery, is not the jury's verdict so inconsistent that due process requires that the conviction be dismissed?

2. Where a verdict of guilty is based upon uncorroborated testimony of an undercover police agent who admitted personally pocketing more than $4,000.00 in bribes from a co-defendant, is not due process denied when the defendant is not permitted, either upon cross-examination or in the presentation of his own case, to prove bias on the part of the said police witness who expended thousands of dollars in excess of any money legally acquired during the period covered by his earlier testimony, and who was in fact a dual agent who practiced extortion for profit?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Constitutional Provision involved is the Due Process Clause of the 14th Amendment to the Constitution of the United States.

The statutory provisions involved are the act of June 24, 1939, P. L. 872, Sec. 304 (18 Purdon's Pennsylvania Statutes, Sec. 4304) printed in Appendix, p. 31; and the Act of June 15, 1951, P. L. 585, Sec. 1 (19 Purdon's Pennsylvania Statutes, Sec. 871) appearing in the Appendix at p. 32,

STATEMENT OF THE CASE

Petitioner was indicted in the Fall of 1957 and the Spring of 1958, for operation of a lottery, corrupt solicitation and bribery.[1]

At about the same time, he and a co-defendant, Anthony Grosso, were indicted together for conspiracy to operate a lottery and for conspiracy.[2]

On November 18, 1958, the indictments were consolidated for trial, and Petitioner and the other defendant were tried in the Court of Quarter Sessions of the Peace of Allegheny County before the Honorable Robert

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1. Petitioner was indicted October 17, 1957, for lottery, at No. 331 October Sessions 1957; on March 20, 1958, for corrupt solicitation, at No. 444 March Sessions 1958; and on April 15, 1958, for bribery and corrupt solicitation at No. 330 April Sessions 1958.

2. Petitioner and Grosso were indicted on April 15, 1958, for lottery and conspiracy to operate a lottery at No. 329 April Sessions 1958; on April 21, 1958, they were indicted for conspiracy at No. 580 April Sessions 1958.

M. Morris, President Judge of the 54th Judicial District, specially presiding, and a jury.

The principal witness for the prosecution, Patrolman John B. James, a policeman of the City of Pittsburgh, testified that after he had twice arrested Petitioner on "raids" at an alleged numbers establishment, Petitioner telephoned him and suggested that he—James —meet with Anthony Grosso, the other defendant in the conspiracy indictments.

According to Patrolman James, he agreed and Petitioner met James and introduced him to Grosso. Over the next 16 months (R., 39a-72a) James testified that Grosso paid him $2700.00 in return for James' promise to protect Grosso's lottery operation from police raids (R., 57a).

Throughout the period in question, Patrolman James owned and operated a florist shop in Dormont, a suburb of Pittsburgh. He testified that during this period, Anthony Grosso purchased some $4300.00 worth of flowers from that shop.

Both on cross-examination and in his case in chief, Petitioner endeavored but was not permitted to produce evidence of Patrolman James' personal finances, despite Petitioner's offer of proof that this policeman's personal income (R., 178a-180a) was far in excess of his police salary and of any other legitimate source. (R., 303a-305a) The offer of proof was made to impeach Patrolman James on the basis of bias, corruption and interest.

Petitioner admitted that he brought James to meet Grosso, but testified that this was at the insistence of James and under threat of further prosecution of the

lottery charge. He testified (R., 311a-312a) that he was not previously acquainted with Anthony Grosso.

Grosso testified (R. 500a-562a, 570a, 572a) that he patronized James' florist shop under threat by James of constant police raids and harassment on manufactured charges against a tavern owned by Grosso's wife in Pittsburgh.

After five days of testimony and eleven hours of deliberation, the jury found Petitioner guilty of corrupt solicitation to maintain a lottery, but not guilty of operating a lottery. On all other indictments against Petitioner and Anthony Grosso, the jury disagreed and returned no verdict.

After verdict, Petitioner filed timely motions for a new trial and for arrest of judgment, urging that the verdict was inconsistent and pointing out the Court's error in refusing to permit proof of James' financial acrobatics. The motions were denied August 17, 1959, after argument, by opinion and order filed October 6, 1959 (Appendix, p. 16) (R., pp. 672a-678a). On October 8, 1959, Petitioner was sentenced to pay a fine of $1,000.00 and undergo imprisonment from 1 to 2 years.

From that judgment and sentence, Petitioner appealed to the Superior Court of Pennsylvania on October 15, 1959 and a supersedeas was granted. Upon argument of the appeal, counsel for Petitioner stressed the need for consistency in the verdict, pointing out that the jury could not consistently find Petitioner guilty of soliciting the police officer to protect the operation of a lottery when that same jury had found him not guilty of operating the lottery. Counsel urged judicial error in the Trial Court's refusal of evidence of the police

officer's financial dealings as proof of his corruption and bias. The Superior Court, on March 24, 1960, upheld the judgment and sentence of the Trial Court, saying that "the evidence established that Ornato was operating a lottery", although in fact the jury faced with that evidence found Petitioner not guilty of operating a lottery. (See the Superior Court's opinion, Appendix, p. 22.) That Court, in approving refusal of defense testimony concerning Patrolman James' finances, said that such testimony concerned "a collateral issue that would have completely diverted the jury from the issue being tried" (Appendix, p. 27).

HOW FEDERAL QUESTION IS PRESENTED

On oral argument before the Superior Court, Petitioner's Attorneys raised the question of the denial of Petitioner's rights under the Constitution of the United States in the exclusion of evidence establishing bias on the part of the prosecutor and in the entry of judgment based upon the inconsistent verdicts.

On April 6, 1960, Petitioner prayed the Supreme Court of Pennsylvania for an allocatur (Appendix, p. 32) alleging therein that the courts below had violated Article 14, Section 1 of the United States Constitution in that, inter alia, due process required the Commonwealth to prove the operation of the lottery for which allegedly he had solicited protection from the police officer, and that he was irreparably prejudiced in the exclusion of evidence of the police officer's financial dealings relevant to show his corruption and his extortive practices. By an amended Petition for Allocatur (Appendix, p. 37) Petitioner gave details of the formal offer of proof of Officer James' financial condi-

tion, in further support of the original Petition for Allocatur.

The Supreme Court of Pennsylvania, on July 8, 1960, affirmed with a Per Curiam opinion the judgment and sentence of the Trial Court on the opinion of the Superior Court (Appendix, p. 29), Justice Musmanno dissented (p. 29), pointing out that the Superior Court erred grievously in stating that verdicts in criminal cases need not be consistent. He also took exception to the Supreme Court's adoption of the statement by the Superior Court that

"The evidence established that Ornato was operating a lottery"

since the jury specifically acquitted him on that lottery charge. He further condemned the exclusion of the evidence of Officer James' financial dealings upon cross-examination.

After the refusal by the Supreme Court to reverse the findings of the courts below, Petitioner, on July 19, 1960, was ordered by the Trial Court to be committed to the Allegheny County Workhouse to serve out the sentence previously imposed. He was released on bond, pending disposition of this petition, on September 23, 1960.

REASONS FOR GRANTING THE WRIT

I. Affirmance of the Jury's Contradictory and Inconsistent Verdict by the Courts Below Violates Due Process and Undermines and Jeopardizes the Administration of Criminal Justice.

The indictment of petitioner, at No. 444 March Sessions 1958, of which he was convicted, charges him with the crime of corrupt solicitation for the particular purpose of protecting and maintaining a lottery, with which he and other persons were concerned.[3]

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3. The indictment is set forth as follows, and appears in the printed record at p. 3a:

IN THE COURT OF QUARTER SESSIONS OF THE PEACE OF THE COUNTY OF ALLEGHENY

No. 444 March Sessions, 1958

The Grand Inquest of the Commonwealth of Pennsylvania now inquiring and for the body of the County of Allegheny, upon their oaths and solemn affirmations respectively;

DO PRESENT, That,

Albert Ornato

late of the County aforesaid on the twenty-second day of September, in the year of our Lord, One Thousand Nine Hundred and Fifty-Six, and on divers other days and times subsequent to and after said date at the County aforesaid, and within the Jurisdiction of this Court, with FORCE and ARM, unlawfully did then and there, directly and indirectly, by the offer and promise of money and other thing of value, endeavor to corruptly influence one John B. James, he, the said John B. James then and there being a municipal officer in and for the City of Pittsburgh, to-wit, a police officer of said City of Pittsburgh, lawfully in commission and lawfully acting as such police officer, in the discharge, performance, and non-performance of certain acts, duties and obligations

Yet the jury found him not guilty of maintaining that lottery. To allow such a conviction to stand constitutes a judicial endorsement of ruthless persecution, violating elemental due process and calculated to cast into disrepute the entire process of criminal justice.

The Assistant District Attorney who tried this case for the Commonwealth recognized that the very language of the indictment itself required both proof of a

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pertaining to his said office as such police officer, that is to say, did endeavor to corruptly influence and attempt to corruptly influence the said John B. James as such police officer to refrain from official interfering in the unlawful operation, conducting and maintaining of a certain Lottery, scheme and device of chance by the said Albert Ornato, and divers other persons whose names are to this Inquest unknown then and there being associated and connected with the said Albert Ornato, and otherwise concerned in the unlawful operation, conducting and carrying on of said Lottery for the sale of numbers tickets and numbers policies in the said City of Pittsburgh and elsewhere at divers addresses and places therein, and and to further refrain from arresting and causing the arrest and criminal prosecution of the said Albert Ornato and said other persons whose names are to this Inquest unknown for such unlawful Lottery operations as aforesaid, and to otherwise corruptly influence and attempt to corruptly influence the said John B. James in his official capacity as such police officer in the performance and discharge of his sworn duties as such police officer aforesaid,

contrary to the form of the Act of the General Assembly in such case made and provided, and against the peace and dignity of the Commonwealth of Pennsylvania.

s/ EDWARD C. BOYLE
District Attorney

TEST PRO RESPUB:
John B. James

Sworn by Me:
s/ CHARLES H. WILKINSON
Foreman.

real connection between the Petitioner and Grosso *and the proof of the operation of a lottery,* when he stated in a preliminary argument to the Court:

> "Naturally, in the course of the trial of the case, the very first thing that is going to be introduced is the relationship between Mr. Ornato and Mr. Grosso in the indictment covering conspiracy to bribe and corrupt, the purpose of which is to avoid arrest and obtain protection for the operation of the lottery. We *have to prove* among other things, *that lottery* was being operated, there was a motivation and a conspiracy to bribe and corrupt." (R., 12a) (Emphasis added)

Again at a later stage of the trial, the Prosecutor recognized the Commonwealth's obligation to prove the operation and maintenance of a lottery to conform with the language of the indictments when he stated:

> "Mr. Smith:
>
> "There is a charge of conspiracy to set up and operate a lottery, there is a charge of bribery and corrupt solicitation. The bribery and corrupt solicitation having as its objective to gain the protection of a lottery operation. The elements of proof in relation to both charges and specifically the charge of operating a lottery is to show a lottery was being operated during that period of time by these defendants or this defendant." (R., 67a)

When the jury acquitted Petitioner of the charge of operating a lottery, a vital and essential element of the indictment for corrupt solicitation was removed, and the finding of guilt, predicated on a charge, part of which those same finders of fact had rejected, was an incon-

gruity which the Trial Court and the Appellate Courts were required, by due process of law, to correct.

There was testimony; concededly, which, if believed, would tend to show that Petitioner and Anthony Grosso were engaged in the operation of a lottery; but the jury rejected it, and returned a verdict of not guilty to that indictment. Nevertheless, the Superior Court of Pennsylvania, in its opinion, (Appendix p. 25) said "The evidence *established* that Ornato was operating a lottery." (Emphasis added) Due process has been sadly abused when an appellate court will compound its refusal to annul an inconsistent and absurd verdict by boldly announcing a legal impossibility.

II. Petitioner was denied due process of law by the courts below when he was refused the right both on cross-examination and in his case in chief to bring out evidence of corruption of the prosecuting witness.

This Honorable Court in *Georgia Ry. & Electric Co. v. City of Decatur,* 295 U.S. 165, 55 S. Ct. 701, 79 L. Ed. 1365, said that the refusal of a state court to receive or consider evidence which would have rebutted a presumption unfavorable to Petitioner amounted to a denial of hearing on that issue and was a violation of the due process clause of the United States Constitution.

Since the refusal of pertinent evidence is violative of due process in civil suits, *a fortiori,* refusal to receive evidence to prove a vital part of the defense in criminal proceedings is completely destructive of fair process.

In *Smith v. United States,* 187 F. 2d 192, certiorari denied, 341 U. S. 927, 71 S. Ct. 792, 95 L. Ed. 1358 (1951),

the Court of Appeals for the District of Columbia said that the right to impeach witnesses and to bring out on cross-examination facts as to the alleged misconduct of the police are safeguards on the defendant's rights to a fair trial under the due process clause.

Recently this Court, in *Napue v. Illinois*, 360 U. S. 264, 79 S. Ct. 1173, reaffirmed the principle that a conviction obtained through the use of false evidence, with the acquiescence of the state, must fall under the 14th Amendment. There, this Court held that the jury should have known all of the facts affecting a crucial witness' credibility; equally, in the instant case, fundamental fairness demanded that the finders of fact be apprised of the culpable conduct of the prosecuting officer whose clear and obvious bias counsel for petitioner was ready to demonstrate. In a trial on a charge of bribery and corrupt solicitation, evidence of the informant's extortive proclivities is certainly germane.

Petitioner in the instant case, as heretofore pointed out, was prepared to prove the venality of the prosecuting witness by proof of his unexplained acquisition of substantial wealth, compelling the inference that he lied when he testified that he turned over all "protection" money he was allegedly paid, thus showing his bias and corruption, which would impeach the whole of his testimony. The Trial Court's refusal to permit counsel for Petitioner to offer the testimony outlined in his formal offer of proof made it virtually impossible for Petitioner adequately to attack the credibility of the witness James and therefore, deprived the defendant of a fair trial. It is submitted that in a case such as this, where a defendant is charged with corrupt solicitation

and bribery, and his defense is that the Commonwealth's prosecutor was in fact practicing extortion, the bias, corruption and interest of the prosecutor is clearly relevant. In those circumstances, the huge and unexplained income of Patrolman James has a direct bearing upon his honesty and integrity and was not collateral to the issues in this case.

McCormick on Evidence, §40, page 86 states:

> "In courtroom parlance, facts showing bias are not 'collateral,' and the cross-examiner is not required to 'take the answer' of the witnesses, but may call other witnesses to prove them."

This view is recognized in *Underhill's Criminal Evidence*, 5th Edition, §246, where it states:

> "The bias of the witness and his interest in the event of the prosecution are not collateral and may always be proved to enable the jury to estimate his credibility. They may be proved by his own testimony upon cross-examination or by independent evidence."

The defendant in these cases contended that the Commonwealth's prosecutor was engaged in a large scale scheme of extortion and, in order to protect his own reputation, threatened Ornato, and inflicted physical violence upon Ornato and two members of his family in an attempt to coerce Ornato into committing perjury. In view of those contentions, and the evidence on the record in support thereof, the interest and bias of the Officer James was clearly an issue in this case.

Wigmore on Evidence, Vol. 3, §945, states that particular circumstances showing bias are always admissible:

"The doctrine of excluding facts offered by extrinsic testimony has never been applied to this subject."

That Officer James obtained the information that was the basis of his testimony in the guise of a spy is evident from his testimony. *Wigmore* deals specifically with this type of evidence:

> Section 969. (1) "One who as a spy obtains information of a crime is not necessarily open to discredit thereby; but one who for that purpose has employed trickery, or who has worked for hire in his investigations, or who by his function as a police or detective or prosecuting officer has committed himself in a partisan manner, may under the circumstances be open to the suspicion of bias or interest."

James, by his own admission, profited by his alleged undercover work by pocketing over four thousand dollars on flowers allegedly sold to Grosso. It is obviously to James' interest to prevent the jury from knowing that he has spent sums of cash far in excess of that which he legally had available during 1957 and 1958. and the limitation of cross-examination upon this matter was a denial of due process.

This conviction, as shown by evidence offered by Petitioner but refused by the Trial Court, encourages police officers everywhere to cooperate with racketeering elements in organizing crime and vice, without fear of judicial oversight. Today, when all judges, attorneys, police officers and others concerned with law enforcement are aware of the constant growth of organized crime in urban areas throughout the United States, it is vital that urban police activities be free of any suggestion of cooperation with such organizations. The ac-

tions of the Courts below can only encourage extortion, bribery and police corruption.

CONCLUSION

For the foregoing reasons, it is submitted that this Petition should be granted.

Respectfully submitted,

EDWARD P. GOOD
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JAMES P. MCARDLE

JAMES E. MCLAUGHLIN
606 Frick Building

APPENDIX TO PETITION

IN THE
COURT OF QUARTER SESSIONS OF THE PEACE
OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH
v.
ALBERT ORNATO
} No. 444 March Sessions, 1958
Corrupt Solicitation

Opinion of the Court

Before: SOFFEL, REED and MORRIS, J. J.

For the Commonwealth:
WILLIAM CLANEY SMITH
Assistant District Attorney

For the Defendant:
HENRY MUSTIN
JAMES P. MCARDLE

MORRIS, P. J., 54th Judicial District, Specially Presiding August 17, 1959. On November 18th, 1959, the defendant, Albert Ornato, was tried on these individual indictments:

No. 330 April Sessions, 1958 Bribery & Corrupt Solicitation. (20 Counts).

No. 331 October Term, 1957, Lottery

No. 444 March Sessions, 1958, Corrupt Solicitation. Defendant, Ornato, was also indicted with one, Patrick Flaherty, but tried individually after severance on the following indictment:

No. 288 October Term, 1957, Lottery.

Defendant, Ornato. was indicted jointly with one Anthony Grosso and tried on these joint indictments:

No. 329 April Sessions, 1958, Conspiracy to operate a Lottery and Conspiracy.

No. 580 April Sessions, 1958, Conspiracy.

On November 26th, 1958, after approximately eleven hours of deliberation, the jury returned the following verdicts:

Nos. 283 and 331, wherein the defendant, Ornato, was indicted individually for lottery, the verdict was not guilty.

In No. 444, wherein the defendant, Ornato, was indicted individually for corrupt solicitation, the verdict was guilty.

No. 329, where the defendants, Grosso and Ornato, were jointly indicted for lottery and conspiracy to operate a lottery, the verdict was not guilty.

In No. 330, wherein the defendant, Ornato was indicted for bribery and corrupt solicitation, the jury was unable to reach a verdict and a mistrial was declared.

In No. 580, wherein the defendant, Ornato, was jointly indicted and tried with the defendant, Anthony Grosso, on the charge of conspiracy, the jury was unable to reach a verdict and a mistrial was declared.

The defendant, Albert Ornato, is before this Court on his motion for arrest of judgment and motion for a new trial. This defendant's position for judgment of acquittal on the record, with respect to those indictments in which the jury was unable to agree on a verdict, is

treated in a separate Opinion by this Court, filed at No. 436 March Sessions, 1958.

The statutory authority for defendant's motion for arrest of judgment is the Act of June 15, 1957, P. L. 585, Sec. 1 (19 P. S. 871) which states as follows:

> "Hereafter in all criminal prosecutions in the Commonwealth in which the jury shall have rendered a verdict against the defendant, the defendant may, in addition to making a motion in arrest of judgment on the grounds that there is error appearing on the face of the record, may make a motion in arrest of judgment on the grounds that the evidence was insufficient to sustain the charge, and if the court, after consideration of the entire record, shall decide that there is not sufficient evidence to sustain the conviction, it shall forthwith discharge the defendant and dismiss the case."

For the purpose of considering motions in arrest of judgment and for new trial, the Court must accept as correct evidence submitted by the Commonwealth, which the jury saw fit to believe, as well as reasonable inferences which properly could be derived from such evidence. *Comm. v. Jackson,* 187 Pa. Sup. 2 (1958); *Comm. v. Elias,* 186 Pa. Sup. 137 (1958); *Comm. v. Brown,* 184 Pa. Sup. 494 (1957; *Comm. v. Wright,* 383 Pa. 532 (1956).

From the evidence on the part of the Commonwealth, we find that James testified that Ornato proposed that he meet Grosso to discuss the numbers business by "getting together" (T. 40-41). He testified that the defendant Ornato made the arrangements for a meeting with Grosso and did introduce James to Grosso

(T. 41-42). He testified that Ornato admitted he was going to Grosso's "book".

Ornato admitted he was in the numbers business in the year 1955 (T. 355), but denied being so engaged at any other time. However, he later changed his story and admitted being in the numbers business in 1937. (T. 356).

James further testified that at a meeting with Grosso, he (Grosso) told him his area of operation was "downtown"; that he and Grosso agreed on a price for protection of his numbers business, and that the first payment was made. (T. 43-44).

All of the elements of the crime of corrupt solicitations are present and on the testimony of Officer James alone, it would be sufficient to sustain the conviction, and the jury so found.

We see no merit to the defendant's contentions.

Counsel for the defendant gave the usual reasons in their motion for a new trial, namely; (1) the verdict was against the weight of the evidence; (2) the verdict was inconsistent; (3) the verdict was contrary to the law and the evidence; (4) the Court erred in refusing the admission of evidence in behalf of the defendant; (5) the Court erred in admitting evidence in behalf of the Commonwealth over objection of the defendant; (6) the Court erred in refusing defendant's formal offer of proof with respect to the witness, James; (7) the Court erred in refusing certain of the defendant's points for change.

Of the foregoing, Defense Counsel argued only the sixth reason, i.e, "the Court erred in refusing defend-

ant's formal offer of proof with respect to the witness James."

The "formal offer of proof" referred to consisted of fifteen paragraphs of alleged expenditures of various sums of money in the purchase of a car, a home, the education of a child, etc., all for the purpose of impeaching Officer James and attacking his credibility. Defense counsel contend that defendant should have been entitled to show James' financial background in order to show that he was, in fact, a corrupt police officer.

The purpose of the cross-examination in the case was obviously to imply that the witness was not an honest person, therefore, he was not believable. Defense counsel attempted to go into collateral issues to impliedly try the witness on general allegations and inferences of dishonesty, which did not meet the recognized requirements of proof affecting credibility.

This very question was presented and ruled on in the case of *Commonwealth v. Caserta,* 177 Pa. Sup. 461 (1955). This case was also one in which the defendant was charged with conspiracy to operate a lottery and operating a lottery. The facts were partially summarized by the Superior Court as follows:

> "(Counsel offered) then 'to show the expenditure of large sums of money . . . to affect the credibility of this witness on the ground he was unemployed and had no assets', counsel, contending the witness has bought a house for $2,200 in 1944, asked the witness, "How much did you pay for your home in 1944?" The Court, stating 'you cannot delve into his personal affairs to that extent', sustained the

objection of the District Attorney and stopped further cross-examination along that line."

The Superior Court continued,

"Counsel having asked the witness whether he was a decent, law-abiding citizen, was then attempting to show that he spent more money than he earned, therefore he must have gotten the money unlawfully, therefore he was not decent, therefore he should not be believed. He was cross-examining him on collateral issues for the admitted purpose of laying the ground to contradict him and thus affect his credibility. This he could not properly do.

Comm. v. Scouton, 20 Pa. Sup. 503, 519 (1902); *Comm. v. Petrillo,* 341 Pa. 209 (1941).

"Cross-examination has a way of drifting into collateral issues and the proper time to stop it is a matter within the sound discretion of the court. In the absence of an abuse of discretion the trial court will not be reversed.

Comm. v Evancho, 175 Pa. Sup. 225. (1954).

We have carefully reviewed the evidence and the charge of the Court, all of which covers some 700 pages, and we believe that throughout the trial of this case, and in the Court's Charge, the defendant was given every protection and benefit accorded by law. There is no hesitancy on our part in saying that we believe the verdict of the jury is just and right and that this defendant received a fair and impartial trial.

Therefore, we make the following

ORDER

AND NOW, August 17, 1959, the defendant's motions in arrest of judgment and for a new trial are overruled.

BY THE COURT

ROBERT M. MORRIS

P. J., 54th Judicial District

Specially Presiding.

We concur in the foregoing Opinion and Order.

SARA M. SOFFEL, J.

FRANK E. REED, J.

Opinion of the Pennsylvania Superior Court

191 Pa. Superior Ct. 581

COMMONWEALTH OF PENNSYLVANIA

v.

ALBERT ORNATO, Appellant.

Superior Court of Pennsylvania.

March 24, 1960.

James P. McArdle, James E. McLaughlin, McArdle, Harrington & McLaughlin, Pittsburgh, for appellant.

Edward C. Boyle Dist. Atty., William Claney Smith, Asst. Dist. Atty., Pittsburgh, for appellee.

Before RHODES, P. J., and GUNTHER, WRIGHT, WOODSIDE, ERVIN and WATKINS, JJ.

WOODSIDE, Judge.

Albert Ornato was tried with others before a jury in the Court of Quarter Sessions of Allegheny County

on a number of charges involving bribery, corrupt solicitation, conspiracy and operating a lottery. He was convicted of corrupt solicitation. The jury either acquitted him or could not agree upon a verdict on the other indictments.

After the court below refused the defendant's motion for arrest of judgment and for a new trial, he was sentenced to pay a fine of $1,000 and to undergo imprisonment of not less than one nor more than two years. He appealed to this Court contending that the evidence was insufficient to sustain the conviction and that there were trial errors entitling him to a new trial.

[1] The Act of June 15, 1951, P.L. 585, § 1, 19 P.S. § 871, provides: "* * * if the court, after consideration of the entire record, shall decide that there is not sufficient evidence to sustain the conviction, it shall forthwith discharge the defendant and dismiss the case." Prior to the enactment of this statute the only relief the court could grant when it decided that there was not sufficient evidence to sustain the conviction was to grant a new trial. In considering the entire record under this statute, the court must ignore the evidence of the defendant and his witnesses which the jury had the privilege of rejecting, and must accept as correct *all* the evidence which supports the verdict, and must draw from the evidence such reasonable inferences as will support the verdict. *Commonwealth v. Wright*, 1956, 383 Pa. 532, 119 A.2d 492.

Ornato was convicted of violating section 304 of the Act of June 24, 1939, P.L. 872, 18 P.S. § 4304, which provides as follows: "Whoever, directly or indirectly, by offer or promise of money, office, appointment, employ-

ment, testimonial or other thing of value, or by threats or intimidation, endeavors to influence any * * * public officer, in the discharge, performance, or nonperformance of any act, duty or obligation pertaining to such office, is guilty of corrupt solicitation, * * *"

[2] There was evidence before the jury to support a finding that Ornato was engaged in an illegal lottery operation. Ornato was arrested on August 21, 1956, and again on September 21, 1956, for operating a lottery at his residence, 1904 Fifth Ave., Pittsburgh. John B. James, a Pittsburgh policeman and one of the arresting officers, testified that on the way to the police station after the last arrest, Ornato asked him "if there was any way we could forget about this particular case," and "said that he was all right downtown, there was no reason why him and I couldn't get together." The defendant then suggested to Officer James that he (James) and Tony Grosso should get together. The same evening Ornato called James at his flower shop, and suggested arranging an appointment with Grosso. The officer accepted the offer, and according to arrangements met Ornato at 2 o'clock that night under the clock outside Kaufmann's store. James left his car parked nearby and went with Ornato in the latter's car to the Fort Pitt Hotel where they parked. Ornato then excused himself for a few minutes and, as James said, "walked up to a car parked three or four cars ahead and in a matter of three or four minutes, he came back and took me up and introduced me to Mr. Grosso." Ornato then went back to his car and James got into Grosso's car. Grosso with permission of James searched him, presumably for recording devices or weapons. Grosso discussed the numbers racket with James and said he "had" the down-

town area, and "a portion of the North Side and some of the uptown business, up on Fifth Avenue and Forbes Street." Grosso then offered James $200 per month to protect this area, which included the area where the defendant had been twice raided. James agreed, accepted $100 and later, at various times, additional sums totaling $2,700 which he said he delivered to his superiors along with police reports.[1] The evidence established that Ornato was operating a lottery; that following his arrest for this violation, he suggested to the arresting officer that there be some "way" to "forget" the case and that they "get together" that he suggested during the same conversation that James meet Grosso; that Ornato brought about the meeting of James and Grosso in the dark of the night under furtive circumstances; and that as a result of this meeting, payments were made by Grosso to James for protection of the area in which Ornato had been recently twice arrested on lottery charges. These facts taken together were sufficient for the jury to find Ornato guilty.

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1. According to the record (pages 57a and 58a of the printed record and page 63 of the original) James testified as follows: "A. On that occasion, Mr. Ornato came to the flower shop in Dormont and he paid me $486, $400 of it was for the protection of the things I have already mentioned." When this is examined in the light of the testimony given by James immediately before it and immediately after it, along with his statement that Ornato made no payments to him (pages 186a and 187a of the record), it is clear that the witness was referring to Grosso and not Ornato, and that either the reporter erroneously reported the name or it was a slip of the tongue by the witness. We have assumed in evaluating the evidence that the witness was referring to Grosso and not Ornato.

[3] The appellant contends that we may not consider the evidence which shows that he was involved in an illegal lottery because the jury acquitted him on the indictment charging him with a specific violation of the lottery law.

We recently said, "An acquittal cannot be interpreted as a specific finding in relation to some of the evidence. As in other cases of this kind, the court looks upon this acquittal as no more than the jury's assumption of a power which they had no right to exercise, but to which they were disposed through lenity * * * Even though it may have been improperly exercised, the jury had the power to accept the testimony as it applied to one series of offenses and not as to the others." *Commonwealth v. Parrotto,* 1959, 189 Pa. Super. 415, 422, 423, 150 A.2d 396, 399. See also *Commonwealth v. Kline,* 1933, 107 Pa. Super. 594, 602, 164 A. 124. In the Parrotto case we also quoted from *Commonwealth v. Franklin,* 1952, 172 Pa. Super. 152, 193, 92 A.2d 272: "To the jury belongs the power to err, not alone in gullibility but also deliberately."

We think there was sufficient evidence from which the jury could properly infer the defendant's guilt.

The appellant contends that the trial judge committed reversible error by denying him the right to show, in order to affect the credibility of Officer James, that he [James] expended sums in excess of all monies he could legally have acquired.

[4] The cross-examination of James was not unduly limited by the trial judge. In addition to lengthy interrogation bearing directly on the issue, the trial judge

permitted the defendants to elicit testimony from James in order to affect his credibility that prior to 1945, while a city policeman, he was also a passenger trainman for the Pennsylvania Railroad; that he operated a flower shop; that Ornato and Grosso bought flowers from him and that Grosso's bill was hundreds of dollars a month; that he sometimes carried $100 bills; that while he was receiving money from Grosso he obtained a new Cadillac sedan, a new Plymouth station wagon and a new house; that he did not bring the prosecution against Grosso or Ornato until he was called before an investigating grand jury approximately eighteen months after Grosso started to pay him for protection; that he had testified in a prior trial that members of his own squad accused him "of practically being a thief"; and that he represented on his application for a position on the police force that he had a college degree when in fact he did not.

When counsel for the defendant attempted to go into greater detail concerning the personal income and expenditures of the witness, the trial judge limited further cross-examination and refused offers of proof on this subject. To have permitted this testimony would have resulted in the trial of a collateral issue that would have completely diverted the jury from the issue being tried. Days could be devoted to interrogation concerning the receipts and expenditures of a witness before it would be possible to determine whether he could account for the source of all the money he spent over a period of years.

[5] Not every suspicious act of a witness is open to examination under the guise of affecting his credibility. In *Elliott v. Boyles*, 1857, 31 Pa. 65, 67, the Supreme

Court said concerning the scope of cross-examination: "It would be absolutely intolerable that a man, by being brought into court as a witness, should be bound to submit all the acts of his life to the exposure of malice, under the pretense of testing his credibility."

[6, 7] The credibility of a witness may be attacked by asking him whether he has not been convicted of a particular crime if it be crimen falsi or such as affects his credibility. *Commonwealth v. Payne,* 1913, 242 Pa. 394, 401, 89 A. 559. A witness may not be cross-examined for the purpose of affecting his credibility concerning alleged violations of criminal laws not directly connected with the case on trial and for which he has never been convicted. *Stout v. Rassel,* 1798, 2 Yeates 334, 338; *Weiss v. London Guarantee & Accident Co.,* 1926, 285 Pa. 251, 132 A. 120; *Commonwealth v. Varano,* 1917, 258 Pa. 442, 446, 102 A. 131; *2 Henry Pennsylvania Evidence* (4th Ed.) § 815.

We had occasion to recently rule on this precise question in a case so similar in its facts to the one before us that it governs the motion for a new trial in this case. *Commonwealth v. Caserta,* 1955, 177 Pa. Super. 461, 110 A.2d 808. We there said: "Cross examination has a way of drifting into collateral issues and the proper time to stop it is a matter within the sound discretion of the court. In the absence of an abuse of discretion the trial court will not be reversed. *Com. v. Evancho,* 1954, 175 Pa. Super. 225, 103 A.2d 289." (177 Pa. Super. at page 468, 119 A.2d at page 812)

Judgment of sentence affirmed, and it is ordered that appellant appear in the court below at such time as he may be there called, and that he be by that court

committed until he has complied with his sentence or any part thereof which had not been performed at the time the order of supersedeas was entered.

HIRT, J., absent.

IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH v. ORNATO, Appellant.

Argued June 30, 1960. Before JONES, C. J., BELL, MUSMANNO, JONES, COHEN, BOK AND EAGEN, JJ.

OPINION PER CURIAM, July 8, 1960:

The judgment and order of the Superior Court is affirmed on the opinion of Judge WOODSIDE for a unanimous court (HIRT, J., absent), reported at 191 Pa. Superior Ct. 581, 159 A. 2d 223.

Judgment and order affirmed.

DISSENTING OPINION BY MR. JUSTICE MUSMANNO:

This Court has affirmed the conviction in this case on the Opinion of the Superior Court, and thus accepts it as its own. There are some statements in that Opinion with which I cannot agree. For instance, the Majority says: " 'The evidence established that Ornato was operating a lottery.' (Emphasis supplied)."

How can the Majority make such a statement when the jury specifically acquitted Ornato on the charge of operating a lottery? Is the Majority changing the meaning of the word "established"? Does it intend to say that the verdict of a jury has no validity? Are we now minimizing the sanctity of a jury's verdict? Are

we now juridically to say that the verdict of a jury has no weight in so far as facts are concerned? And if it does not decide the facts, what does it decide?

The Majority seeks to give one erroneous statement authority by quoting another erroneous statement. It quotes from the Superior Court in the case of *Com. v. Parrotto,* 189 Pa. Superior Ct. 415, where it said: "An acquittal cannot be interpreted as a specific finding in relation to some of the evidence."

In that case it also said that "consistency in a verdict in a criminal case is not necessary." Why shouldn't there be consistency in a verdict which may involve the life or liberty of the accused?

The epigrammatic terseness and the show of authority with which an illogical statement is made does not supply the missing logic. In the Temple of Reason an unreasonable statement gains no authority because of the elevation of the pulpit from which it is proclaimed.

In point of covincingness, how does the statement: "Consistency in a verdict in a criminal case is not necessary" differ from the statement that: "Reliability in a verdict in a criminal case is not necessary" or "Justice in a verdict in a criminal case is not necessary"? There is no limit to the absurd declarations which can be announced if one is disposed to ignore logic, reason, rationalization and the constitutional guarantee which go with trial by jury.

To say that "consistency in a verdict in a criminal case is not necessary" is to utter the ultimate in inconsistency because the word "verdict" itself means con-

sistency, it means agreement; it means a meeting of the minds without contradiction; it means a unanimous concord in thinking and conclusion.

And then, why does the Court say that consistency is not necessary in a verdict in a *criminal case?* Does this mean that it *is* necessary in a civil case? And if so, does this further mean that a person's good name, his liberty and even his very life, when placed in jeopardy in a trial, are of less consequence than his property?

I believe that the defendant is entitled to a new trial because of inconsistency in the verdict. I believe also that his exercise of the right of cross-examination was unnecessarily curtailed and that, for that reason alone, he is entitled to a new trial. (Underhill's Criminal Evidence, 5th Ed. Sec. 246).

Statutes

18 Purdon's Statutes

"§4304. Corrupt Solicitation. Whoever, directly or indirectly, by offer or promise of money, office, appointment, employment, testimonial or other thing of value, or by threats or intimidation, endeavors to influence any member of the General Assembly, State, county, election, municipal or other public officer, in the discharge, performance, or nonperformance of any act, duty or obligation pertaining to such office, is guilty of corrupt solicitation, a misdemeanor, and on conviction thereof, shall be sentenced to pay a fine not exceeding one thousand dollars, or to undergo imprisonment not exceeding two (2) years, or both. 1939, June 24, P.L. 872 § 304."

19 Purdon's Statutes

"§ 871. Hereafter, in all criminal prosecutions in this Commonwealth in which the jury shall have rendered a verdict against the defendant, the defendant may, in addition to making a motion in arrest of judgment on the grounds that there is error appearing on the face of the record, may make a motion in arrest of judgment on the grounds that the evidence was insufficient to sustain the charge and if the Court, after consideration of the entire record, shall decide that there is not sufficient evidence to sustain the conviction, it shall forthwith discharge the defendant and dismiss the case. 1951, June 15, P.L. 585, § 1."

IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH
v.
ALBERT ORNATO

No. 2304A of 1960
Misc. Docket

Petition for Allocatur

To the Honorable, The Judges of the Said Court:

The Petition of Albert Ornato by his Attorney, McARDLE, HARRINGTON & McLAUGHLIN respectfully represents:

1. On November 18th, 1958, the defendant, Albert Ornato, was tried on these individual indictments:

No. 330 April Sessions, 1958, Bribery & Corrupt Solicitation (20 Counts).

No. 331 October Term, 1957, Lottery.

No. 444 March Sessions, 1958, Corrupt Solicitation.

Defendant, Ornato, was also indicted with one, Patrick Flaherty, but tried individually after severance on the following indictment:

No. 283 October Term, 1957, Lottery.

Defendant, Ornato, was indicted jointly with one Anthony Grosso and tried on these joint indictments:

No. 329 April Sessions, 1958, Conspiracy to operate a Lottery and conspiracy.

No. 580 April Sessions, 1958, Conspiracy.

2. On November 26th, 1958, after approximately eleven hours of deliberation, the jury returned the following verdicts:

Nos. 283 and 331, wherein the defendant, Ornato, was indicted individually for lottery, the verdict was not guilty.

In No. 444, wherein the defendant, Ornato, was indicted individually for corrupt solicitation, the verdict was guilty. No. 329, where the defendant Grosso and Ornato, were jointly indicted for lottery and conspiracy to operate a lottery, the verdict was not guilty.

In No. 330, wherein the defendant, Ornato, was indicted for bribery and corrupt solicitation, the jury was unable to reach a verdict and a mistrial was declared.

In No. 580, where the defendant, Ornato, was jointly indicted and tried with the defendant, Anthony Grosso, on the charge of conspiracy, the jury was unable to reach a verdict and mistrial was declared.

3. In an opinion filed October 6, 1959, the trial Court refused the defendant's motion for arrest of judgment and for a new trial filed December 1, 1958.

4. On October 8, 1959, the defendant was sentenced to pay a fine of $1,000 and to undergo imprisonment of not less than one, nor more than two years.

5. On October 13, 1959, at Number 14 April Term, 1960, the defendant appealed to the Superior Court of Pennsylvania from the judgment of Sentence of the Court of Quarter Sessions of the Peace of Allegheny County at Number 444 March Session, 1958.

6. On October 15, 1959, the defendant filed a Petition for Supersedeas and by Order of Court bond was set in the amount of Twenty-five hundred ($2500) dollars.

7. On March 24, 1960, the Superior Court filed an opinion affirming the judgment of sentence of the Court of Quarter Sessions of the Peace of Allegheny County and ordered the defendant to appear in this court at such time as he may be called and that he be committed until he has complied with his sentence.

8. That petition makes this appeal ot the Supreme Court under Section 7 (a) of the Act of June 24, 1895 P.L. 212 (17 P.S. 190) which provides as follows:

> "Nevertheless in any action or proceeding whatever above committed to the final and exclusive decision of the said court, there may still be an appeal from its judgment to the supreme court:
>
> First. If the jurisdiction of the superior court is in issue or

Second. If the case involves the construction or application of the constitution of the United States or of any statute or treaty of the United States; or

Third. If the case involves the construction or application of the constitution of Pennsylvania; or

Fourth. If the appeal to the supreme court be specially allowed by the superior court itself or by any one justice of the supreme court. (1895, June 24, P.L. 212 § 7 (e))."

9. Petitioner alleges a violation of Article 14 Section 1 of the United States Constitution and of Article 1 Section 9 of the Constitution of the Commonwealth of Pennsylvania in that:

(1) The Appellant has been convicted of the crime of Corrupt Solicitation and the record discloses that the Commonwealth failed to prove the basic elements of the crime.

(2) Where Appellant has been indicted for and convicted of the crime of Corrupt Solicitation for the purpose of protecting and maintaining a Lottery the Commonwealth is required to prove that Appellant did in Fact conduct and maintain a Lottery.

(a) The jury acquitted the defendant of the charge of maintaining a Lottery.

(b) There was, therefore, no competent evidence before the lower court and its refusal to grant an arrest of judgment under the Act of June 15, 1957, P.L. 585, § 1 (19 P.S. 871) was an abuse of discretion which was persisted in by the Superior Court.

(3) The trial court erred grievously in its ruling on evidence thereby prejudicing the defendant irreparably, in that:

(a) A guilty verdict was based upon the uncorroborated evidence of an undercover police agent who admitted personally pocketing over Four Thousand Dollars from one defendant during the period in question.

(b) The fact that this alleged undercover agent expended thousands of dollars in excess of all monies he could legally have acquired is relevant and material in determining his credibility, particularly in view of the charge of the defense that he was a dual agent and in fact an Extortioner for personal profit.

10. That copies of the briefs and records filed in this case in the Superior court accompany this petition.

WHEREFORE, Petitioner, by his Attorneys, MCARDLE, HARRINGTON & MCLAUGHLIN, prays that he be allowed to appeal from the judgment of the Superior court aforesaid to the Supreme Court of Pennsylvania.

JAMES E. MCLAUGHLIN
Attorney for Petitioner

Amendment to the Petition for Allocatur

To the Honorable, the Judges of the Said Court:

The Petition of Albert Ornato by his Attorneys, McARDLE, HARRINGTON & McLAUGHLIN is amended to read as follows:

In further support of the allegations contained in Paragraph 9, Subsection 1, the following facts are offered:

1. The crime for which the appellant was indicted and tried is the statutory crime of corrupt solicitation and is defined as follows in 18 P.S. 4304.

"Whoever, directly or indirectly, by offer or promise of money, office, appointment, employment, testimonial or other thing of value, or by threats or intimidation, endeavors to influence any member of the general assembly, state, county, election, municipal or other public officer in a discharge, performance, or nonperformance of any act, duty or obligation pertaining to such office, is guilty of corrupt solicitation and on conviction thereof, shall be sentenced to pay a fine of $1,000.00 or to undergo imprisonment not exceeding two (2) years or both."

2. The appellant was convicted of the crime of corrupt solicitation which was alleged to have occurred on September 22, 1956.

3. It is submitted that appellant is entitled to an arrest of judgment in this conviction by reason of the failure of the Commonwealth to prove that appellant made or even knew of any offer or promise of anything of value to Patrolman James, the principal witness for

the Commonwealth. The instant case is completely devoid of any testimony which would in any way connect the appellant with an offer of anything of value to James.

4. The Commonwealth elicited testimony to the effect that codefendant Anthony Grosso tendered certain monies to Officer James, however, it is respectfully contended that it was incumbent upon the Commonwealth to prove a connection between Defendant Ornato and Defendant Grosso in order to convict Ornato of offering or promising James something of value. The only connection between Ornato and Grosso which the Commonwealth attempted to prove was Ornato's introduction of James to Grosso.

5. The following is a verbatim transcript of the entire Commonwealth's testimony in relation to the alleged corrupt solicitation of James by Ornato on September 22, 1956.

"Officer James Testified:

I was taking Mr. Ornato to No. 2 station to book him and he asked me if there was any way we could forget about this particular case.

Q. Any other thing he said at that time?

A. Yes, there was.

Q. What was that, sir?

A. He said that he was alright down-town, there was no reason why him and I couldn't get together.

Q. Did anything else unusual happen after you had taken Mr. Ornato down to be booked? Just tell us the sequence of events in the course of the investigation.

A. That evening there was.
Q. What happened that evening?
A. I received a phone call from Mr. Ornato.
Q. Will you tell us what happened, what was the nature of your conversation?
A. Well, I got this phone call at the Flower Shop in Dormont and I answered the phone, it was Mr. Ornato on the phone, he wanted to know if I would be interested to meet Mr. Grosso. I beg your pardon, earlier that afternoon I had talked to him as to what book he was going to—
Q. What did he say at that time?
The Court: Talked to whom?
A. Mr. Ornato on the way to the station, I had forgotten to mention that. He did mention that me and Tony Grosso should get together.
Q. And you booked him irrespective of that?
A. Yes, I did.
Q. Now, what happened that evening?
A. Mr. Ornato called me about 6:30 or a quarter of seven at the back phone in the Flower Shop and wanted to know if I would be interested in meeting Mr. Grosso.
Q. Did he arrange an appointment for you at that time?
A. He did.
Q. What arrangements did he make?
A. He told me that he would meet me under Kaufmann's clock at 2:00 in the morning.
Q. Did you meet him on that occasion?
A. I did.
We arrived at the Penn Avenue side of the Fort Pitt Hotel and he excused himself for a few moments, said he would be back. He walked up

to a car parked three or four cars ahead and in a matter of three or four minutes, he came back and took me up and introduced me to Mr. Grosso.

Q. What did he say?

A. This is John James, this is Tony Grosso.

Q. What happened then?

A. Well, Mr. Ornato left, he went back to his car."

6. The following facts are offered in further support of the allegations contained in Paragraph 9, Subsection 3.

In the instant case, Patrolman James earned slightly less than five thousand dollars per year from the force during the period in question, and lost money on his flower business. Counsel for appellant offered to prove that during this period James earned and spent the following sums as set forth in defendant's formal offer of proof:

"1. That in the year 1956, John James made a down payment of $2,000.00 cash on a 1954 Cadillac.

2. That in the year 1956, John James stated to the Potter Bank and Trust Company that he had an outside source of income to the extent of $20,000.00 per year, said income coming from the Dormont Flower Shop.

3. That in the year 1956, the books of the Dormont Flower Shop showed a loss of $2,048.26.

4. That in the year 1957, John James showed a profit of $264.70 in the operation of his Flower Shop and that he earned $4,578.96 as an officer on the police department of the City of Pittsburgh.

5. That during the year 1957, John James paid $573.41 in cash to the Potter Bank and Trust Company to liquidate an installment loan.

6. That in the year 1957, John James made a cash down payment of $582.50 on a 1957 Plymouth Stationwagon.

7. That in the year 1957, John James paid $2,762.00 in cash for a 1956 Cadillac automobile.

8. That in the year 1957, John James paid $744.22 to the Department of Internal Revenue.

9. That in the year 1957, John James paid $742.00 to the Potter Bank and Trust Company on an installment loan contract.

10. That in the year 1957, John James expended a minimum of $2,642.00 for the education and maintenance of his two daughters.

11. That in the year 1957, John James stated in a credit application to the Potter Bank and Trust Company that he had an income, in addition to his officer's salary, of $12,000.00 and that said income came from the Dormont Flower Shop.

12. That in the year 1958, John James made a cash down payment of $5,000.00 on the home in which he presently resides.

13. That in the year 1958, John James paid $2,575.00 in cash for a highlift.

14. That in the year 1958, John James spent $916.79 in cash on furniture purchased from the Santoni Furniture and Salvage Company.

15. That in the year 1958, John James has expended the sum of $954.00 to date in payment of an installment loan contract to the Potter Bank and Trust Company.

It is submitted that on their very face the foregoing facts were relevant and material, and that their exclusion was so prejudicial as to warrant the granting of a new trial.

It is submitted that the trial court's refusal to permit counsel for the appellant to offer the testimony outlined in appellant's formal offer of proof made it virtually impossible for counsel to adequately attack the credibility of the witness James, and, therefore, deprived the appellant of a fair trial.

WHEREFORE, Petitioner, by his Attorneys McARDLE, HARRINGTON & McLAUGHLIN, prays that he be allowed to appeal from the judgment of the Superior court aforesaid to the Supreme Court of Pennsylvania.

J. E. McLAUGHLIN
Attorney for Petitioner